

On this ground I agree that the appeal must be refused.

LORD ARDWALL concurred.

The Court answered the question of law in the negative and dismissed the appeal.

Counsel for the Appellant—Moncrieff, Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Horne, Agents—W. & J. Burness, W.S.

Saturday, December 15.

FIRST DIVISION.
PENDER'S TRUSTEES, PETITIONERS.

Trust—Nobile Officium—Jurisdiction—English Trust with Scotch Heritage—General Power to Trustees on English Trust to Grant Feus and Mineral Leases of Trust-Estate in Scotland.

Trustees under an English trust holding Scotch heritage having obtained an order of the High Court of Justice in England sanctioning the application by them to the Courts in Scotland for power to grant feus and mineral leases, petitioned the Court, in virtue of its *nobile officium*, for, *inter alia*, general powers to grant feus and mineral leases of the Scottish heritage.

The Court, exercising an auxiliary jurisdiction, and with the view of enabling the order of the English Court to be carried out, granted the powers craved in the terms of the order of the English Court.

On 9th January 1903 Sir John Denison Pender, K.C.M.G., and others (Sir John Pender's trustees) presented a petition to the First Division of the Court, in which they, *inter alia*, narrated that the testator, a domiciled Englishman, had died in 1896 leaving moveables and heritage, and included in the heritage the lands of Seafield, Blackburn, and Whitehill, in Linlithgowshire, which he had bought for the purpose of developing the minerals; that the testator had granted a lease of certain minerals to the Pumpherstons Oil Company Limited, for thirty-one years and of a portion of the lands for building purposes for ninety-nine years, on which the company's works had been erected, and also a feu of a piece of ground for the erection of workmen's houses; that the lease of the minerals had been terminated and they were anxious and had arranged terms for a renewal thereof; that they had also been asked for a feu for a school by the School Board of the Parish of Livingston; that although they had under the testator's will express power to sell the heritage, their power to grant feus or a valid lease had been questioned; that conceiving it in the interest of the trust they should have such powers, and the trust being an English trust, they had

applied to the High Court of Justice for a judgment on that question; and that Mr Justice Swinfen Eady in the said application pronounced the following order:—
“And the Judge being of opinion that it is expedient in the interests of the beneficiaries under the said will that the trustees thereof should have power to deal with the lands of the testator in Scotland devised by the said will by granting feus thereof for building purposes or by leasing the same and the minerals thereunder for mining purposes in accordance in either case with the custom of the locality in which the said lands are respectively situate, and as regards any mining lease subject to setting aside as capital money such part of the rent as is required by section 11 of the Settled Land Act 1882, and also being of opinion that by the law of England, so far as it controls the trusts of the lands devised by the said will and codicils, such feus and leases for mining purposes might be made of the said lands and minerals under the Settled Lands Acts, but the said Acts do not extend to property in Scotland, and the plaintiffs by their counsel, and the defendants Sir James Pender and Dame Marion Denison Des Voeux by their solicitor, consenting to the following order: It is ordered, that the plaintiffs, Sir John Denison Pender, Lord John Hay, and Richard Enfield, as such trustees as aforesaid, be empowered to apply at any time or from time to time to the proper Court or Courts in Scotland for all necessary relief to enable them to give effect to this direction, and particularly to obtain power and authority to enable the granting with regard to the lands in Scotland devised by and subject to the trusts of the said will of feus for building purposes and of leases for mining purposes.”

The prayer of the petition, after providing for service, continued—“And thereafter on resuming consideration hereof, and after such inquiry into the circumstances as to your Lordships shall seem meet, to grant warrant to, authorise and empower the petitioners to grant mineral leases of the minerals in the said lands of Seafield, Blackburn, and Whitehill, in the county of Linlithgow, for periods not exceeding thirty-one years, and to grant feus of the said lands or any part thereof; or otherwise and in any event to grant warrant to, authorise and empower the petitioners to grant a new lease of the shale and coal in the lands of Seafield, Blackburn, and Whitehill, formerly let by the said late Sir John Pender to the said Pumpherstons Oil Company, Limited, in terms of the said missives, and to grant a feu to the School Board of the Parish of Livingstone of a piece of ground not exceeding one acre in extent for the erection of a school; or to do further or otherwise in the premises as to your Lordships may seem proper. . . .”

The petitioners now presented a note, dated 7th July 1906, in the said petition, in which after narrating the presentation of the petition, the granting by the Court on 21st February 1903 of power for the particular lease and feu therein mentioned, and the granting under a subsequent note, on

14th June 1904, of power for a building lease of an additional acre to the Pumpherston Oil Company, Limited, stated that they had been again requested by the Pumpherston Oil Company to grant a feu of an additional piece of land extending to 1 rood 21 poles 12 2-9th square yards, part of the lands of Seafeld, and that application for power therefor was now made, but "the want of power to grant feus or building or other leases, and the consequent necessity for applying on each separate occasion when such are required to your Lordships for power to grant the same, hampers the petitioners in their administration of the trust-estate, and makes it difficult for them to develop the same to the full extent. It further involves the trust-estate in considerable expense, and this difficulty and expense would be obviated were a general power to feu or to grant mineral or building leases given to the petitioners, in terms of the order pronounced on 1st December 1902 by Mr Justice Swinfen Eady, which is printed in the said petition, and is referred to for its terms. The expense of the present application will not be less than £20, while the annual feu-duty to be received is only £4, 9s. 3d.," and "that this note is presented in conformity with the proceedings taken in the English Court, as narrated in said petition, and as an appeal to the *nobile officium* of the Court."

The prayer of the note, after providing for service, was—"And thereafter on resuming consideration hereof, and after such inquiry into the circumstances as to your Lordships shall seem meet, to grant warrant to authorise and empower the petitioners to grant feus or building leases of the said lands or any part thereof, or alternatively to authorise and empower the petitioners to grant a building lease or feu of the said piece of ground of 1 rood 31 poles and 12 2-9th square yards in extent to the said Pumpherston Oil Company, Limited, in terms of the said offer; or to do further or otherwise in the premises as to your Lordships may seem proper."

Argued for the petitioners—This was an appeal to the *nobile officium* of the Court, as owing to this trust being an English one the Trust Acts were inapplicable. The English Court was satisfied as to the expediency of the powers craved, and the trustees had been given under the will express power to sell. Successive applications for each feu or lease involved the trust-estate in unnecessary expense, and therefore the general powers asked for should be granted. Such powers had been granted in the Outer House, where a general power to feu had been granted with a minimum rate of feu-duty fixed.—Reference was made to *Allan's Trustees*, March 13, 1897, 24 R. 718, 34 S.L.R. 532, and to the Settled Land Act 1882 (45 and 46 Vict. cap. 38), section 10.

At advising—

LORD PEARSON—This petition was presented in 1903 by the testamentary trustees of the late Sir John Fender. The testator died in 1896 domiciled in England. He left certain heritable estate, part of which is

land in the county of Linlithgow, which he had purchased for the purpose of developing the minerals therein. He had during his life leased the minerals in the estate to the Pumpherston Oil Company, and had besides granted to them a long lease of 18 acres of the land for building purposes, on which the company's works are now erected. He had also feued to the company a further portion of the lands for building workmen's houses.

The trustees being desirous of renewing the mineral leases and of feuing certain parts of the lands, presented this petition on the footing that (as was decided in the case of *Carruthers' Trustees*, 24 R. 233) our Trust Acts do not apply to English trusts, and that therefore it was necessary to invoke the *nobile officium* of the Court in order to confer formal authority upon the English trustees to deal with Scottish heritage. A precedent for this course is found in the case of *Allan's Trustees*, 24 R. 718, where English trustees being desirous of selling certain houses in Midlothian, which formed part of the trust-estate, obtained an order from a Judge of the High Court of Justice in England declaring that the sale was expedient in the interests of the beneficiaries, and empowering the trustees to apply to the Court of Session to obtain power and authority to sell the property. The trustees then petitioned this Court to grant them the requisite authority to sell, and the Court granted the petition, on the ground that, it being established by the order of the Judge that a sale was competent under the trust and was expedient in the interests of the beneficiaries, it was proper that this Court should give its assistance in carrying out that order.

In the present petition there is produced an order by Mr Justice Swinfen Eady declaring that it is expedient in the interests of the beneficiaries that the trustees should have power to deal with the lands in Scotland by granting feus for building purposes and leases for mining purposes, and that by the law of England such feus and leases of the lands and minerals might be made under the Settled Land Acts, and empowering the trustees to apply at any time or from time to time to the proper Court in Scotland for authority to enable the granting of such feus and leases. Under this petition the Court have already granted authority to the trustees on two occasions, first in 1903, to grant a new lease of the minerals, and to feu an acre of land to a school board; and again in 1904, to feu another acre of land to the Pumpherston Oil Company. They now present this note in the petition craving authority to grant an additional feu to the Pumpherston Oil Company on the conditions set forth in an offer appended to the note. I have no doubt that this crave ought to be granted.

But the note raises a wider question, which is also raised by the terms of the original petition, namely, whether the Court ought not now to give authority in general terms to the trustees to grant feus

or building leases of the lands or any part thereof, or (as it is expressed still more widely in the original petition) to grant mineral leases of the minerals for periods not exceeding thirty-one years, and to grant feus of the said lands or any part thereof. In both cases the general authority is asked subject to such inquiry into the circumstances as to the Court shall seem meet. The petitioners say, and I can well believe it, that the necessity for separate applications hampers them in the administration of the trust estate and involves considerable expense. Now, there there might be some difficulty in giving them this general authority if this Court were vested with any duty of supervising the trustees or calling them to account for their actings. But as I understand the position, our intervention does not affect the responsibility of the trustees to the English Courts, but is given merely (as it was expressed in the case of *Allan's Trustees*) by way of exercising an auxiliary jurisdiction to enable the order of the English Court to be carried out. In this view it is neither necessary nor expedient that we should have an inquiry now into the circumstances of the estates, in order to make up our minds whether we should grant the general powers which are asked. That would involve considerations with which we have no concern, for the trustees are answerable for their administration not to us but to the English Courts. I am therefore disposed to grant the more general powers, but as regards the precise extent of those powers I think that we should follow as closely as possible the terms of the English order.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor—

“(After authorising the petitioners to grant the particular feu in question) . . . And further in respect of the order of the High Court of Justice in England, . . . grant warrant to authorise and empower the said trustees and executors to grant feus of the lands of Seafield, Blackburn, and Whitehill mentioned in the petition, or any part thereof, for building purposes, and to grant leases of the said lands or any part thereof, and the minerals thereunder for mining purposes in accordance in either case with the custom of the locality; and decern.”

Counsel for the Petitioner—Blackburn, K.C.—Maitland. Agents—Murray, Beith, & Murray, W.S.

Tuesday, December 18.

SECOND DIVISION.

[Lord Dundas, Ordinary.]

M'CAIG v. GLASGOW UNIVERSITY
AND OTHERS.

Succession—Trust—Disinheritance of Heir—Public Policy.

A testator by his holograph settlement appointed trustees, and, *inter alia*, provided—“The purpose of the trust is that my heritable property be not sold but let to tenants, and the clear revenue or income be used for the purpose of erecting monuments and statues for myself, brothers, and sisters” on a certain tower. . . . “the making of these statues to be given to Scotch sculptors from time to time as the necessary funds may accumulate . . . also that artistic towers be built” on a specified hillock “and on other prominent points” on his estate. “My wish and desire is to encourage young and rising artists, and for that purpose prizes be given for the best plans of the proposed statues, towers, &c., before building them.” He further stated that his purpose and intention was that this trust should be perpetual. By a codicil he explained that the statues were to be of himself, his father and mother, and his five brothers and four sisters, and were to cost not less than £1000. He directed also that £300 a year be paid to such of his brothers and sisters as might survive him as long as they lived.

Held (rev. Lord Ordinary Dundas) that the holograph settlement and codicil were not valid and effectual to dispose of the estates and effects, heritable and moveable, of the testator except as regarded the said annuities, and that his sister, who was his heir-at-law and heir *ab intestato*, was entitled to have conveyed to her his whole estate, on the ground that she was not divested by the deeds which, with the above exception, created no beneficial interest in any third person or body of persons, or in the general public.

Opinion (per Lord Low) that the purposes of the trust, “although whimsical and of no utility, are perfectly lawful, and cannot, I think, be regarded as contrary to public policy.”

Opinion (per Lord Kyllachy) that “if it is not unlawful it ought to be unlawful to dedicate by testamentary disposition for all time, or for a length of time, the whole income of a large estate, real and personal, to objects of no utility . . . and which have no other purpose or use than that of perpetuating at great cost, and in an absurd manner, the idiosyncrasies of an eccentric testator. I doubt much whether a bequest of that character is a lawful exercise of the *testamenti factio*.”